

**DEPARTMENT OF STATE REVENUE**  
**LETTER OF FINDINGS NUMBER: 07-0451**  
**Sales Tax**  
**For Tax Years 2002 and 2003**

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**ISSUES**

**I. Sales Tax—Imposition.**

**Authority:** IC § 6-2.5-6-14.1; IC § 6-8.1-3-1; IC § 6-8.1-5-1; IC § 6-8.1-9-1.

Taxpayer protests the assessment of sales tax.

**II. Tax Administration—Negligence Penalty.**

**Authority:** IC § 6-8.1-10-2.1; 45 IAC 15-11-2.

Taxpayer protests the imposition of a ten percent negligence penalty.

**STATEMENT OF FACTS**

Taxpayer is in the business of renting shipping pallets to its customers in Indiana and nationwide. Taxpayer filed a claim for refund on sales tax collected and remitted to the Indiana Department of Revenue ("Department"). The Department issued the refund for the years 2001, 2002, and 2003. When Taxpayer filed a similar claim for later years, that claim was handled by a different division of the Department. That division determined that neither claim should have been granted. By the time this determination was made, the year 2001 was out of statute for the Department to issue assessments to recover the refund it believed was issued in error. The Department issued assessments to recover the amounts of refund issued for 2002 and 2003. Taxpayer protests these assessments. Further facts will be supplied as required.

**I. Sales Tax—Imposition.**

**DISCUSSION**

Taxpayer claimed and received a refund of sales tax for the years 2001, 2002, and 2003. The Department determined that Taxpayer was not entitled to the refund on the basis that the activity

in question did not qualify for the exemption claimed. The Department issued proposed assessments for the years 2002 and 2003 to recover the refunds issued for those years. The Department did not issue a proposed assessment for 2001, since that year was beyond the statute of limitations for issuing proposed assessments. Taxpayer protests the determination that it was not entitled to the refunds and also protests the assessments issued to recover the refunds for the years 2002 and 2003. Taxpayer offers several arguments on the validity of the application of the claimed exemption. Taxpayer also claims that it has already issued refunds to its customers. However, Taxpayer has provided no documentation supporting this claim. The burden of proving a proposed assessment wrong rests with the person against whom the assessment is made, as provided by IC § 6-8.1-5-1(c).

The Department refers to IC § 6-8.1-3-1(a), which states:

The department has the primary responsibility for the administration, collection, and enforcement of the listed taxes. In carrying out that responsibility, the department may exercise all the powers conferred on it under this article in respect to any of those taxes.

The Department also refers to IC § 6-8.1-5-1(b), which states:

If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department. The amount of the assessment is considered a tax payment not made by the due date and is subject to IC 6-8.1-10 concerning the imposition of penalties and interest. The department shall send the person a notice of the proposed assessment through the United States mail.

Taxpayer protests that the Department cannot issue assessments on the amounts refunded for 2002 and 2003. Under IC § 6-8.1-5-1(b), the Department is authorized to make proposed assessments if it believes that a taxpayer has not reported the proper amount of tax due. In the instant case, the Department determined that Taxpayer did not report the proper amount of tax due since Taxpayer was in possession of sales tax refunds to which it was not entitled. Therefore, under IC § 6-8.1-5-1(b), the Department was authorized to issue proposed assessments to recover the refunds it believed were issued in error.

Also, the Department refers to IC § 6-8.1-9-1(a), which states:

If a person has paid more tax than the person determines is legally due for a particular taxable period, the person may file a claim for a refund with the department. Except as provided in subsections (f) and (g), in order to obtain the refund, the person must file the claim with the department within three (3) years after the latter of the following:

- (1) The due date of the return.
- (2) The date of payment.

For purposes of this section, the due date for a return filed for the state gross retail

or use tax, the gasoline tax, the special fuel tax, the motor carrier fuel tax, the oil inspection fee, or the petroleum severance tax is the end of the calendar year which contains the taxable period for which the return is filed. The claim must set forth the amount of the refund to which the person is entitled and the reasons that the person is entitled to the refund.

Also, the Department refers to IC § 6-2.5-6-14.1, which states:

Notwithstanding the refund provisions of this article as incorporated from the gross income tax law (IC 6-2.1, repealed), a retail merchant is not entitled to a refund of state gross retail or use taxes unless the retail merchant refunds those taxes to the person from whom they were collected.

As explained previously, Taxpayer collected and remitted sales tax from its customers. Taxpayer did not pay any sales tax, and has not established that it refunded any sales tax to its customers, which are the prerequisites for claiming a refund. If anyone has the right to claim a refund, regardless of the validity of the claim, those people are Taxpayer's customers, since those customers are the ones who paid sales tax. The fact that Taxpayer does not qualify to claim the refund under IC § 6-8.1-9-1(a) renders the question of eligibility for and validity of the claimed exemption moot. Also, Taxpayer has not provided any documentation in support of its claim that it provided refunds to its customers, as required by IC § 6-2.5-6-14.1. Taxpayer has not met the burden of proving the proposed assessments wrong, as required by IC § 6-8.1-5-1(c).

### **FINDING**

Taxpayer's claim is denied.

## **II. Tax Administration—Negligence Penalty.**

### **DISCUSSION**

The Department issued proposed assessments and the ten percent negligence penalty for the tax year in question. Taxpayer protests the imposition of penalty. The Department refers to IC § 6-8.1-10-2.1(a), which states in relevant part:

If a person:

...

(3) incurs, upon examination by the department, a deficiency that is due to negligence;

...

the person is subject to a penalty.

The Department refers to 45 IAC 15-11-2(b), which states:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary

reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

45 IAC 15-11-2(c) provides in pertinent part:

The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section.

In this case, Taxpayer claimed and received a refund to which the Department determined Taxpayer was not entitled. While this position is confirmed in Issue I of this Letter of Findings, this does not constitute negligence on Taxpayer's part under 45 IAC 15-11-2(b), and so was subject to a penalty under IC § 6-8.1-10-2.1(a). Taxpayer has affirmatively established that there was not a failure to pay a deficiency, but rather there was a claim for refund which was inappropriate. The Department received the sales tax from Taxpayer's customers on time, which constitutes ordinary business care and not negligence, as provided by 45 IAC 15-11-2(c).

### **FINDING**

Taxpayer's protest is sustained.

WL/LS/DK November 19, 2007.